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No. 469

In the Supreme Court of the United States

OCTOBER TERM, 1957

CONSTANTINE MACRIS, PETITIONER

v.

SOCIEDAD MARITIMA SAN NICOLAS, S. A., AND PETMAR AGENCIES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Pursuant to the request of the Court, the United States respectfully submits the following expression of its views on the issues involved in this case.

STATEMENT

Petitioner, a Greek national, was hired as second mate of the S. S. Euryviades in November, 1951, in Greece (Pet. 21). Two months later, while the vessel was moored at Bremen, Germany, he sustained a hernia while engaged with other members of the crew in hauling in a line (Pet. 21). He was examined by a doctor in Bremen, and again in Santos, Brazil, the ship's next port of call (Pet. 10, 21). The ship then

proceeded via Trinidad to Baltimore, Maryland, where petitioner was again examined both by a private physician and at a United States Public Health Service Hospital (Pet. 21). He was found "fit for light work not involving heavy lifting," but an operation was recommended (Pet. 21). He signed off the vessel for return to Greece for the operation, but when faced with a few days detention at Ellis Island while awaiting passage home, he voluntarily signed back on as second mate of the Euryviades on April 7, 1952, and made the trip from Baltimore to Korea and back to California (Pet. 21).

When the vessel arrived in California in the summer of 1952, petitioner again signed off the ship for the purpose of having an operation (Pet. 21). He traveled to New York at his employer's expense, and underwent two operations at a hospital there in August 1952 (Pet. 22). Afterwards, petitioner suffered physical impairment, allegedly caused by the administration of an anaesthetic in the course of the second operation (Pet. 22). He remained in an out-patient status, but, although directed to do so, he failed to return for further treatment (Pet. 22).

Petitioner's complaint in the District Court was expressly limited to a claim for recovery for the aggravation of his injury caused by the alleged negligence of the respondents and the unseaworthiness of their vessel during the three-month period following his re-employment in Baltimore on April 7, 1952 (Pet. 22). He claimed that this aggravation made necessary two operations instead of one, and thereby

caused his subsequent disability (Pet. 22).[1] After a five-day trial, the District Court found that this cause of action had not been proved, and found as a fact that petitioner's condition had not deteriorated between his re-employment in Baltimore on April 7, 1952, and the time he left the ship in California on July 7, 1952 (Pet. 16–17, 22).

At the conclusion of the trial, petitioner's counsel made a "perfunctory" motion "to amend the pleadings to conform to the proof" (Pet. 23); after the District Court had announced its adverse decision on the merits, counsel renewed this motion and indicated for the first time that he desired to broaden his pleadings to assert the respondents' liability for the original hernia in Bremen and for its aggravation during the voyage from Bremen to Baltimore (Pet. 13, 23). The District Court denied this motion (Pet. 9–14), on the ground that proof had not been taken on this new claim except as incidental to other matters (Pet. 11). The trial judge pointed out that petitioner's counsel had deliberately chosen the theory upon which he in-

[1] The opinion of the District Court states (Pet. 10): "Petitioner limited his claim to aggravation of his condition after his re-employment in Baltimore. By so doing he believed that he strengthened his contention that this Court should assume jurisdiction of the subject matter and that the Jones Act was applicable. This position was maintained consistently throughout the trial. Plaintiff did offer proof of the prior events at Bremen and Santos, but this proof was received solely upon the issue of defendants' duty subsequent to re-employment in Baltimore — not as to possible fault of the defendants in Bremen or between Bremen and Baltimore. Defendants objected to its receipt for any purpose. Plaintiff acquiesced in the Court's limitation."

tended to proceed and that he had refrained from asking to amend until the case had been lost upon the original theory (Pet. 13).

The Court of Appeals affirmed, holding that in these circumstances the trial court was clearly within its discretion in denying the motion to amend (Pet. 24). The court found further that the denial of the motion to amend was not prejudicial in any event "for the simple reason that the evidence failed to show any breach of duty to Macris on the part of the defendants prior to the ship's arrival in Baltimore" (Pet. 24).[2] Petitioner now seeks review in this Court of the denial of his motion to amend, and contends that he is entitled to further compensation for his injury despite the absence of either negligence or unseaworthiness.

DISCUSSION

Even if the very considerable procedural bars to the amendment of petitioner's complaint were swept aside, we can see no substantive basis in the present

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[2] The Court of Appeals stated (Pet. 24):

> * * * There was no proof that unseaworthiness of the vessel or the defendants' negligence was a cause of Macris' original injury at Bremen. There was no proof that aggravation of his condition between Bremen and Baltimore, was so caused. There was no proof of any negligent failure to provide Macris with medical treatment either before or after the vessel stopped at Baltimore, and there was affirmative evidence, and an affirmative finding that there had been no such failure.

[3] Both of the courts below held that there was no ground for permitting petitioner, after trial, to change the theory of his action and seek recovery for his original injury, rather than its alleged aggravation after his re-employment in Baltimore. In denying petitioner's motion under Rule 15 (b),

law—including the law as it can be appropriately developed by admiralty courts—on which he could recover damages for his injury. Both the District Court and the Court of Appeals found that the evidence failed to show any breach of duty to petitioner on the part of the respondents prior to the ship's arrival in Baltimore, whether predicated upon negligence or upon unseaworthiness, and whether referring to the causation of his injury, its aggravation, or the medical treatment afforded it. (Pet. 16, 24.) Nor does petitioner contend that he could produce any evidence to this effect. He urges rather that, notwithstanding absence of proof of negligence or unseaworthiness, he is nevertheless entitled to compensation because he was injured in the performance of his duties, while acting in obedience to an order of his superior. We

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F. R. Civ. P., to amend his pleadings to conform to the evidence, the District Court pointed out that "proof had not been taken as to the claim attempted to be added to the complaint, except as incidental to other matters" (Pet. 11), and accordingly that an amendment in these circumstances was improper. See 3 Moore's *Federal Practice* (2nd ed.), 846-847; *Simms* v. *Andrews*, 118 F. 2d 803, 807 (C. A. 10); *United States* v. *City of Brookhaven*, 134 F. 2d 442, 446 (C. A. 5). The court likewise refused to permit amendment under Rule 15 (a), holding that petitioner's "failure to move to amend in advance of trial was deliberate and not excusable" (Pet. 13), and that petitioner's counsel "had in fact badgered his 'opponent" with the possibility of this amendment, as an "incident in a war of nerves." (Pet. 13.) The Court of Appeals affirmed the District Court's ruling, concluding (Pet. 24) that "[u]nder the circumstances disclosed by the record, the trial court was clearly within its discretion in denying the motion to amend." For these reasons, irrespective of the merits of petitioner's present claim in this Court, he would appear to be barred from pressing it at this late stage in the litigation.

believe, however, that under existing law petitioner has received all of the benefits to which he is entitled for an injury incurred in such circumstances and accordingly that even if he were permitted to amend his complaint he could show no substantive ground for recovery.

1. Petitioner states no claim under existing law. A seaman's right to recover for injuries received in the course of his employment is limited, on the one hand, to a contractual right under the general maritime law to maintenance and cure, plus indemnity for his injuries if they result from the vessel's unseaworthiness and, on the other hand, a right under the Jones Act, 46 U. S. C. 688, to recover damages for injury or death caused by the negligence of the owner, master, or fellow-servant. Petitioner does not in this Court allege violation of either of these rights.

(*a*) *The general maritime law.* Under the general maritime law of the United States, a seaman who is injured in the course of his employment is entitled both to maintenance and cure, and to an indemnity from the vessel and its owners beyond maintenance and cure for injuries sustained as a result of the failure of the owners of the ship to provide a seaworthy vessel, or to supply and keep in order the proper appliances appurtenant to the ship. *The Osceola*, 189 U. S. 158. Petitioner makes no claim that the ship on which he received his injuries was unseaworthy; nor does he contend here that he was denied any of the maintenance and cure to which he was entitled. As the result of his injuries, he was awarded maintenance and cure through January 5, 1953, the District

Court holding that the shipowner's obligation was discharged after that date because petitioner refused to return to the hospital for further treatment as directed (Pet. 14).[4] In addition, the trial court expressly left open the possible right of petitioner to claim maintenance and cure for any future corrective operation and recuperation therefrom. Petitioner has thus received the full measure of maintenance and cure to which he was entitled, and, since he makes no claim that the vessel was unseaworthy, he has shown no basis for any further relief under the general maritime law.

(*b*) *The Jones Act.* In addition to the seaman's contractual rights under the general maritime law to maintenance and cure and indemnity, he is also entitled under the Jones Act, 46 U. S. C. 688, to recover damages for injuries or death in consequence of the negligence of the owner, the master, or a fellow member of the crew, by means of an action at law against the owner. The gist of an action under the Jones Act is negligence (*De Zon* v. *American President Lines,* 318 U. S. 660, 665; *Engel* v. *Davenport,* 271 U. S. 33), which the seaman must establish in

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[4] In affirming the District Court on this point, the Court of Appeals stated (Pet. 24-25):

> • • • Generally a refusal by a seaman of proffered care and treatment discharges the obligation of maintenance and cure. *Bailey* v. *City of New York,* 135 F. (2d) 427 (2 Cir., 1946); *The Saguache,* 112 F. (2d) 482 (2 Cir., 1940). Exceptions to this rule exist, when reasonable grounds for refusing care are shown. *Luth* v. *Palmer Shipping Corp.,* 210 F. (2d) 224 (3 Cir., 1954). But here the evidence was insufficient to remove the case from the operation of the general rule.

order to recover. But just as petitioner makes no allegation of unseaworthiness, so too he makes no claim that his injury was caused by negligence, either of a ship's officer or of a fellow crew member. Accordingly, there is no basis for relief under this statute.[5]

2. Petitioner, then, has alleged no violation of an existing right, either contractual or statutory, and accordingly there is no present remedy of which he can avail himself. He nevertheless contends that this Court should find some basis for awarding him compensation solely because his injury was received in the course of his employment. In view of the settled principles of maritime law respecting the rights of injured seamen, however, and the consistent refusal by Congress to modify these rights to provide for compensation on such a basis, we are unable to see any ground for affording petitioner judicial relief.

(*a*) The circumstances of petitioner's injury would support a claim for compensation only if petitioner were entitled to the benefits of a workmen's compensation statute. "[T]he basic operating principle [of workmen's compensation legislation] is that an employee is automatically entitled to certain benefits

[5] Moreover, there is considerable question whether the Jones Act would apply to this case. The petition is an alien, and the District Court found sufficient evidence of foreign ownership to treat the shipowner "as a Panamanian owner in fact as well as in form * * *" (Pet. 18). Petitioner's injury occurred in a foreign port (Bremen), and it seems unlikely that he could claim the benefits of the Jones Act in a suit in a United States court. Cf. *Lauritzen* v. *Larsen*, 345 U. S. 571; *The Paula*, 91 F. 2d 1001, 1003–1004 (C. A. 2); *Gambera* v. *Bergoty*, 132 F. 2d 414, 415 (C. A. 2), certiorari denied, 319 U. S. 742.

whenever he suffers a 'personal injury by accident arising out of and in the course of employment'; * * * negligence and fault are largely immaterial * * *." In exchange for the "modest but assured benefits" of workmen's compensation, employees and their dependents "give up their common-law right to sue the employer for damages for any injury covered by the act," 1 Larson, *Workmen's Compensation Law*, § 1.10.

Although Congress provided compensation coverage for some maritime workers by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901, *et seq.*, that statute expressly excludes from its "coverage" a "master or members of a crew of any vessel * * *." 33 U. S. C. 903. This exclusion "was at the request of seamen who notified the [Congressional] committee in charge that they preferred the remedy for damages under the Act of 1920 [the Jones Act] to the benefits that would be theirs under a system of workmen's compensation." *Warner* v. *Goltra*, 293 U. S. 155, 160; see Hearings before a Subcommittee of the Senate Committee on the Judiciary, 69th Cong., 1st Sess., on S. 3170, at p. 17; 68 Cong. Rec. 5908; *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 134, 136.[4] All subsequent efforts to extend workmen's compensation coverage to masters and crew

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[4] Nor are seamen such as petitioner entitled to the benefits of state workmen's compensation acts; the Jones Act "covers the entire field of liability for injuries to seamen" and is "paramount and exclusive and supersedes the operation of all state statutes dealing with that subject." *Lindgren* v. *United States*, 281 U. S. 38, 47. See *Nogueira* v. *N. Y., N. H. & H. R. Co.*, *supra*, 281 U. S. at 135; 2 Larson, *Workmen's Compensation Law*, § 90.42.

members have likewise been met with the opposition of the representatives of various seamen's organizations. See *South Chicago Co.* v. *Bassett,* 309 U. S. 251, 256–257; *Norton* v. *Warner Co.,* 321 U. S. 565, 570; *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, 715; *Farrell* v. *United States,* 336 U. S. 511, 518; Statement of National Maritime Union, Hearings before the House Committee on the Merchant Marine and Fisheries on H. R. 7424, 77th Cong., 2d Sess., pp. 30–31; Hearings before the House Committee on Merchant Marine and Fisheries, 76th Cong., 1st Sess. on H. R. 6726 and H. R. 6881; Hearings before a Subcommittee of the Senate Committee on Commerce, 76th Cong., 3rd Sess., on H. R. 6881, p. 111, referring to opposition of seamen and their representatives to such legislation in 1922, 1927, 1939 and 1940.[7]

Thus, despite the fact that all the other leading maritime nations of the world have applied the prin-

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[7] The reason for this opposition was summarized in a brief by Max Lustig, Assistant General Counsel for the National Maritime Union, in these words (Hearings before the House Committee on Merchant Marine and Fisheries, 76th Cong., 1st Sess., on H. R. 6726 and H. R. 6881, p. 83):

> The answer is to be found in the United States statute books and general maritime laws affecting seamen who are injured. Upon an analysis we find that the existing maritime laws amply afford all of the protection that a seaman needs when his injuries are minor and not of a totally disabling kind. That protection is guaranteed by the provisions generally known as maintenance and cure. But, in addition to maintenance and cure, the law guarantees to seamen the right to maintain an action against the steamship owner, to recover by trial, before a court and jury, damages for partial or total disability.

ciple of workmen's compensation to seamen,[8] and despite the earnest recommendation of impartial observers that this country do likewise,[9] seamen have consistently rejected the more certain, if more modest, benefits of a compensation statute for a possibly greater recovery under the Jones Act. "Wisely or unwisely, they have steadfastly preferred the traditional remedy of jury trial for negligence to workmen's compensation based on liability without fault." *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, 715. Whatever may be said as to the wisdom of this choice, the fact remains that it has been the basis of a consistent Congressional policy since the passage of the Jones Act in 1920 to leave undisturbed the existing scheme of remedies available to masters and crew members. Faced with proposals to change the law, Congress has determined to leave it as it is. And, of course, the general authority of Congress to determine the remedies to be afforded seamen injured while engaged in maritime service is beyond dispute. *O'Donnell* v. *Great Lakes Co.,* 318 U. S. 36, 42; *Crowell* v. *Benson,* 285 U. S. 22, 39; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 215.

(*b*) As we have just indicated, during the many hearings which have been held before Congressional committees considering the enactment of comprehen-

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[8] The nations which have done so include Denmark, France, Germany, Great Britain, Holland, Italy, Norway, and Sweden. See Hearings before a Subcommittee of the Senate Committee on Commerce, 76th Cong., 3d Sess., on H. R. 6881, p. 17.

[9] See *e. g.*, Hearings before a Subcommittee of the Senate Committee on Commerce, 76th Cong., 3d Sess., on H. R. 6881, pp. 79–80, 154–156, 162–163, 181–187, 187–188, 292–296.

sive statutory coverage for the entire maritime industry, the relative merits of existing remedies as compared with proposed systems have been explored exhaustively. The failure of Congress to make any change in the established rules regarding the rights of injured seamen clearly constitutes implied approval of the rules as they now exist. For this reason, this Court in *Farrell* v. *United States*, 336 U. S. 511, was constrained to reject a comparable plea by an injured seaman for judicial extension of the traditional remedies available to him. Noting that organized seamen had consistently opposed a system of workmen's compensation (336 U. S. at 518), the Court concluded (336 U. S. at 519):

> The need of this seaman for permanent help is great and his plight most unfortunate. But as the evidence has afforded no basis for supplying that need by finding negligence, neither does the case afford a basis for distortion of the doctrine of maintenance and cure. This seaman was in the service of the United States and extraordinary measures of relief while not impossible are not properly addressed to the courts.

The reasoning of the *Farrell* case is fully applicable here. The courts cannot appropriately develop the new remedies petitioner seeks. And under the existing scheme of seamen's remedies, which Congress has repeatedly re-examined and consistently refused to modify, a seaman in petitioner's position, injured in the course of his employment, must allege and prove either negligence or unseaworthiness in order to recover compensation for his injuries beyond his right

to maintenance and cure. Petitioner has not made, and plainly could not support, such allegations. Accordingly, he was entitled only to maintenance and cure as stated in the proceedings below, and he has no claim under existing law for any further compensation for his injury.

CONCLUSION

For these reasons, we suggest that this Court may find it appropriate to deny the petition for a writ of certiorari.

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December 1957.